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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 293 57

E. D. Donnally v. P. Cullinane, Appellant

PATRICK CULLINANE, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 25, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 299.

PATRICK CULLINANE, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I.—*Petition. Filed July 9, 1879.*

In the Court of Claims. December term, 1879.

PATRICK CULLINANE
versus
THE DISTRICT OF COLUMBIA. } No. 12.

To the honorable judges of the United States Court of Claims:

Your petitioner respectfully represents—

That on the 18th day of September, A. D. 1871, on the 3d day of October, 1871, and on the 13th day of July, 1872, written contracts were made and entered into by and between Henry D. Cook, Alexder R. Shepherd, James A. Magruder, S. P. Brown, and Adolph Cluss, comprising the Board of Public Works of the District of Columbia, in the words and figures as set forth in Exhibits A, B, C, and D, and known as contracts numbered 20, 63, 106, and 394, and which he is unable to set out in full, owing to the Commissioners of the District of Columbia having possession of the same and refusing to give copies thereof.

That by said contracts the said Board of Public Works, on behalf of the District of Columbia, bound themselves to pay unto your petitioner the prices therein specified.

2 That by the terms of said contracts the Board of Public Works, on behalf of the District of Columbia, expressly stipulated and agreed to pay, in lawful money of the United States, to your petitioner the contract price for all work done under said contract.

That the said Board of Public Works, on behalf of the District of Columbia, did fail and refuse to pay your petitioner in the lawful money of the United States, as they had expressly agreed to do, but compelled your petitioner to receive certificates of indebtedness of the Board of Public Works of the value in the lawful money of the United States of 40 to 65 cents on the dollar, and they converted into District bonds, which were of about the same value as the certificates of indebtedness.

That by the failure of the said Board of Public Works to comply with their part of the contracts, in regard to paying your petitioner in the lawful money of the United States, and compelling petitioner to receive certificates of indebtedness of the actual value of about one-half of the value of the lawful money of the United States, whereby petitioner could carry out his part of the contract, so far as it provided that the workmen under petitioner should be paid in cash current, petitioner did have to sell said bonds, received as aforesaid, and he sold them and realized the highest market value of the said District bonds, issued and delivered to him by said Board of Public Works, at the various dates; and by the failure of the Board of Public Works to comply with their part of the contracts petitioner was damaged to the amount of fifty-three thousand dollars in lawful money of the United States.

Your petitioner alleges that he received said certificates and bonds

under protest; and that the defendant has received lawful money from the United States, and also from the tax-payers of the District of Columbia, that should have been applied to the payment of the plaintiff's claim, as they were paid and collected for the identical work done by your petitioner under his said contracts and were moneys had and received by the defendant for the use of the plaintiff.

3 Petitioner alleges that he fully complied with the terms of said contracts; that the work done and accepted under the same at the contract prices, and for which he received in bonds amounted to $118,000; that he has received in bonds of the value in lawful money of the United States of about $65,000, leaving due him about $53,000; and he makes the averment set out in his affidavit part of his petition.

Petitioner demands judgment against the District of Columbia in the sum of fifty-three thousand dollars

PATRICK CULLINANE.
V. B. EDWARDS, *Attorney.*

M. BLAIR,
CHARLES E. CREECY,
Of Counsel.

P. O. address, 611 F street N. W.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

Patrick Cullinane personally appeared before me and made oath according to law that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made by your petitioner, and that he believes he is justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

PATRICK CULLINANE.

Subscribed and sworn to before me this 9th day of July, A. D. 1880.

[SEAL.] GEO. F. GRAHAM.
Notary Public.

4 II.—*Traverse. Filed October* 6, 1880.

And now comes the Attorney General on behalf of the District of Columbia, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Asst. Att'y General.

III.—*Motion for Leave to Amend Petition. Filed December* 11, 1880, *and Allowance of Same.*

To the honorable judges of said Court:

Your petitioner respectfully asks leave of the Court to amend his petition by making an averment as follows:

That on or about October 2, 1873, a statement was made by the auditor of the Board of Public Works of his accounts for
5 work done and materials furnished under his contracts with the Board of Public Works, and the auditor stated the amount at about $133,000.00 after deducting the credits that the District was entitled to. That on the express condition that said Board of Public Works would then pay your petitioner in cash he agreed to deduct from said account above the sum of $15,000.00, which was deducted by said auditor, leaving the sum of $118,000.00; that the officers for the District of Columbia then agreed and stipulated that if your petitioner would take $118,000.00 in the bonds of said District your petitioner should be paid in cash the difference between the actual value of said bonds and their face value, which was, as your petitioner has stated in his petition, a difference of $53,000.00; that petitioner received said bonds under protest, and with the express condition that he would receive the difference in cash.

Yet the said District has failed to perform her contract and pay the difference, and has also retained the $15,000.00 found due your petitioner, and is this sum received for the use of petitioner
6 by said District of Columbia. Petitioner alleges that said District of Columbia has assessed tax lien certificates against the property on said street for the work done and realized the cash therefor. Wherefore petitioner prays judgment against the District of Columbia in the sum of $68,000.00.

PATRICK CULLINANE,
By V. B. EDWARDS, *Att'y.*

W. BLAIR, *Of Counsel.*

DISTRICT OF COLUMBIA, }
County of Washington, } *sct:*

Patrick Cullinane, being sworn, says the foregoing statement is true, as he believes, and he makes the averments in his affidavit to his original petition part of this affidavit.

PATRICK CULLINANE.

Subscribed and sworn to before me this 9th day of December, 1880.

W. S. OFFULT, *N. P.* [SEAL.]

Allowed:
Dec. 13, 1880.

W. A. RICHARDSON, *Judge, &c.*

7 IV.—*Amended Petition by Leave of Court. Filed May* 3, 1881.

To the honorable judges of the United States Court of Claims:

Your petitioner respectfully presents—

That on the 18th day of September, 1871, a written contract (No. 20) was made and entered into by and between your petitioner and Henry D. Cooke, Alexander R. Shepherd, S. P. Brown, A. B. Mullett. and James A. Magruder, comprising the Board of Public Works of the District of Columbia, in the words and figures as set forth in

Exhibit "A;" that on the 1st day of July, 1872, and the 23d day of April, 1873, said contract was extended to embrace other work.

That on the 23d day of September, 1871, petitioner entered into another written contract (No. 63) with the parties aforesaid. This contract was, on the 23d day of November, 1871, and the 1st day of July, 1872, extended to embrace other work, which contract is made Exhibit "B."

That on the 3d day of October, 1871, another written contract (No. 106) was entered into with the parties aforesaid and your petitioner, and is marked Exhibit "C."

That on the 13th day of July, 1872, your petitioner entered into another written contract (No. 394) with the parties aforesaid, and is marked Exhibit "D." And all of said contracts are made a part of this petition.

That the work done and materials furnished by your petitioner to said defendants, under said contracts aforesaid, were accepted by the defendant, and his accounts audited by the auditor of said defendant, and amounted to one hundred and ninety-one thousand and sixty-five dollars and forty-four cents ($191,065.44), less a credit of twelve thousand four hundred and seventy-six dollars and eighty-five cents ($12,476.85) for materials charged to him; that he has since been paid in cash $30,000, Cook's order, $6,000, certificates given by defendant to material, men, and charged to petitioner's account, $8,610.28, leaving due as found due by the auditor, $134,678.31, and certificates of the auditor for this sum given him.

That said debt was not paid according to the terms of his contract, although he demanded payment in lawful money of the United States.

That on or about the 2d day of October, 1873, he presented the several statements of his account which had been given to him by the auditor of the Board of Public Works, and demanded payment, in the lawful money of the United States of his debt against said defendant; that the defendant refused at that time to pay your petitioner in the lawful money of the United States the amount which defendant had found and admitted to be due
8 him, but defendant stated to petitioner that if he would surrender fifteen thousand dollars ($15,000) of the certificates given him by the auditor of the Board of Public Words aforesaid, they (the defendants) would pay him the cash for the certificates of the auditor of the Board of Public Works, which had issued to him, and at that time in his possession, which was about one hundred and thirty-three thousand dollars ($133,000). Your petitioner, upon the condition that he would then and there, at that time, receive lawful money for his debt of one hundred and thirty-three thousand dollars ($133,000), did surrender the sum of $15,000 of his debt, as evidenced by the auditor's certificates, and the defendant did then and there deduct the said sum of fifteen thousand dollars ($15,000) from his account, leaving due him the sum of one hundred and eighteen thousand dollars ($118,000); that said defendant, after said sum had been deducted, refused to pay your petitioner in the lawful money of the United States, but gave your petitioner

bonds of the District of Columbia, which they represented was part of the $4,000,000-loan authorized by act of Congress, and which bonds, so delivered, they agreed should be worth par, or dollar for dollar, and if not, they would pay the difference between the actual value of said bonds and their face value in lawful money of the United States; that, in fact, the bonds so delivered were not part of the $4,000,000 loan authorized by Congress, but were bonds issued by the Governor of the District of Columbia, under and by virtue of the act of the Legislature of the District of Columbia, approved June 25, 1873, and worth, at that time, in lawful money of the United States, not more than about 55 cents on the dollar; that your petitioner has not received from said defendant the difference in lawful money between the actual value of said bonds and the face value, being a difference of fifty-three thousand dollars ($53,000), nor has he received the sum of fifteen thousand dollars ($15,000), the amount of the surrendered certificates, October 2, 1873;

9 That by the terms of said contracts the Board of Public Works, on behalf of the District of Columbia, expressly stipulated and agreed to pay, in the lawful money of the United States, to your petitioner, the contract price for all work done under said contracts.

That the said Board of Public Works, on behalf of the District of Columbia, did fail and refuse to pay your petitioner in the lawful money of the United States, as they had expressly agreed to do, but compelled your petitioner to receive bonds of indebtedness of the District of Columbia of the value in the lawful money of the United States of 40 to 65 cents on the dollar.

That by the failure of the said Board of Public Works to comply with their part of the contracts, in regard to paying your petitioner in the lawful money of the United States, and compelling petitioner to receive bonds of the District of Columbia of the actual value of about one-half of the value of the lawful money of the United States, petitioner did have to sell said bonds, received as aforesaid, and he sold them and realized the highest market value; that by the failure of the Board of Public Works to comply with their part of the contracts petitioner was damaged to the amount of sixty-eight thousand dollars, ($68,000,) in lawful money of the United States.

Your petitioner alleges that he received said bonds under protest; that the defendant has received lawful money of the United States, as also from the taxpayers of the District of Columbia, that should have been applied to the payment of the plaintiff's claim, as they were paid and collected for the identical work done by your petitioner under his said contracts, and were moneys had and received by the defendant for the use of plaintiff.

Petitioner alleges that he fully complied with the terms of said contracts; that the work done and accepted under the same at the contract prices, and for which he received bonds, amounted to one hundred and eighteen thousand dollars, ($118,000;) that he received in bonds of the value in lawful money of the United

10 States of about sixty-five thousand dollars ($65,000), leaving due him about fifty-three thousand dollars ($53,000), on ac-

count of the depreciated value of said bonds; and also the sum of fifteen thousand dollars ($15,000), and interest on this sum at 6 per cent. from the 2d day of October, 1873, and until paid, leaving the total amount due for which your petitioner demands judgment against the District of Columbia in the sum of sixty-eight thousand dollars ($68,000), with interest.

PATRICK CULLINANE.

V. B. EDWARDS, *Attorney.*
M. BLAIR,
CHARLES E. CREECY,
Of Counsel.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

Patrick Cullinane personally appeared before me, and made oath according to law that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made by your petitioner; that he believes he is justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

PATRICK CULLINANE.

Subscribed and sworn to before me, this 30th day of April, A. D. 1881.

[SEAL.] GEO. F. GRAHAM,
Notary Public.

11 V.—*Motion for Leave to Amend Petition Filed June* 15, 1881, *and Allowance of Same.*

To the honorable the judges of said court:

Your petioner asks leave of the court to amend his petition as follows:

By striking out the sum [of] $12,476.85 and inserting $16,896.65, page (2) of petition.

By striking out the sum [of] $8,610.28 and inserting $7,105.97, page (2) of petition, leaving balance due, $167,062.82, for which certificates were given to petitioner; that of this last sum certificates were surrendered, and, as stated in petition, the sums of $30,000.00 and $6,000.00 paid in cash.

Also to add to petition that $2,000.00 was paid for certificates held by Kelly's bank.

Also to add that $112.82 was paid in small sums in cash to petitioner, making total certificates paid in cash $38,112.82.

By striking out $133.678.31 and inserting $128,950.00, page (2) petition.

By striking out 133,000.00 and inserting $128,950.00, page 3, petition.

12 By striking out $118,000.00 and inserting $113,950.00, page 3.

By striking out $118,000.00 and inserting $113,950.00, page 4.

By an averment in said petition alleging and averring that the agreement dated September 13, 1873, signed by petitioner and the Board of Public Works, as written, is silent as to the kind of bonds that were to be delivered to your petitioner; that the bonds were to be at par value, or equal to cash, and, if not, that the defendant would make good in cash the difference; that said agreement does not set forth the true agreement entered into by your petitioner and the Board of Public Works, and that said agreement be reformed and rectified, so as to set forth the true contract entered into between the parties thereto.

And a general prayer for relief.

PATRICK CULLINANE,
By V. B. EDWARDS, *Att'y.*

June 15, 1881.

Allowed.

W. A. RICHARDSON, *Judge, &c.*

June 15, 1881.

13 VI.—*Amended Petition by Leave of Court. Filed June* 23, 1811.

To the honorable the judges of the United States Court of Claims:

Your petitioner respectfully represents—

First. That on the 18th day of September, 1871, a written contract (No. 20) was made and entered into by and between your petitioner and Henry D. Cooke, Alexander R. Shepherd, S. P. Brown, A. B. Mullett, and James A. Magruder, comprising the Board of Public Works of the District of Columbia, in the words and figures as set forth in Exhibit "A;" that on the 1st day of July, 1872, and the 23rd day of April, 1873, said contract was extended to embrace other work and is made part hereof.

Second. That on the 23rd day of September, 1871, petitioner entered into another written contract (No. 63) with the parties aforesaid, and this contract was on the 23rd day of November, 1871, and the 1st day of July, 1872, extended to embrace other work, which contract is made part hereof and marked Exhibit "B."

Third. That on the 3rd day of October, 1871, another written contract (No. 106) was entered into with the parties aforesaid and your petitioner, and is made part hereof and marked Exhibit "C."

Fourth. That on the 13th day of July, 1872, your petitioner entered into another written contract (No. 394) with the parties aforesaid, and said contract is made part hereof and marked Exhibit "D."

Fifth. That under said contracts and extensions your petitioner did perform work and furnish materials, and the said work so done as aforesaid was duly approved by the engineer of the defendants, and certified to as being done in accordance with the contracts aforesaid, and said work and materials were accepted by the defendant, and his accounts at different times audited by the auditor of the Board of Public Works, and the amount found due by the auditor aforesaid, upon the measurements of the defendant's engineers,

amounted on the 29th day of January, 1873, to the sum of $183,563.57. And on the — day of —— 1873, the auditor aforesaid, as aforesaid, further found due your petitioner the sum of $2,267.08. And on the 17th day of July, 1873, the auditor aforesaid, as aforesaid, found the further sum of $5,234.79 due your petitioner for work done as aforesaid, making the aggregate sum found due your petitioner by the auditor aforesaid, as aforesaid, the sum of $191,065.44, and for said sum he should have received from the District of Columbia, according to the terms of the (12) paragraph of his contracts aforesaid, the lawful money of the United States.

14 Sixth. That the auditor deducted from his accounts aforesaid, at the time of auditing the same, for materials furnished by defendant, the sum of $16,896.65, as also the sum of $7,105,97, certificates given to material men, making aggregate deductions $24,002.62, leaving balance for which statements of accounts (known as certificates) were given direct to your petitioner, the face value of which represented the sum of $167,062.82; that of this last-mentioned sum certificates were surrendered and the sums of $30,000 paid by defendant in cash prior to January 29, 1873; the sum of $6,000 paid by defendant on Cooke's order on or prior to March 20, 1873; the sum of $2,000 paid by defendant to Kelley's bank prior to August 6, 1873; the sum of $86.10 paid by defendant in cash April 16, 1873, and the sum of $26.72 in cash September 26, 1873, making the aggregate of these items the sum of $38,112.82, which, deducted, left the actual sum (about) $128,950 due your petitioner and not paid according to the terms of his contracts aforesaid.

Seventh. That on or about the 13th day of September, 1873, he presented the several statements of his account which had been given him by the auditor of the Board of Public Works, and demanded payment, in lawful money of the United States, of his debt against said defendant; that the defendant refused at that time to pay your petitioner in the lawful money of the United States the amount which defendant had found and admitted to be due him, but defendant stated to petitioner that if he would surrender fifteen thousand dollars ($15,000) of the certificates given him by the auditor of the Board of Public Works aforesaid, they (the defendants) would pay him the cash for the certificates of the auditor of the Board of Public Works, which had issued to him, and at that time in his possession, which was about $128,950. Your petitioner alleges and avers that the settlement, while in terms included bonds, was in fact to be upon a cash basis; and upon the condition that he would receive cash, or bonds equivalent of cash, he did on subsequent dates surrender the sum of

15 $15,000 of his debt, as evidenced by the auditor's certificates, and the defendant did deduct the said sum of fifteen thousand dollars ($15,000) from his account, leaving due him the sum of one hundred and thirteen thousand nine hundred and fifty dollars ($113,950); that said defendant, after said sum had been deducted, refused to pay your petitioner in the lawful money of the United States, but agreed that if your petitioner would take bonds

of the District of Columbia, which they represented were part of the $4,000,000 loan authorized by act of Congress, and which they agreed should be worth par, or eqvivalent to cash, and if not they would pay the difference between the actual value of said bonds and their face value in cash; that, in fact, the bonds so delivered were no part of the $4,000,000 loan authorized by Congress, but were bonds issued by the Governor of the District of Columbia under and by virtue of the act of the Legislature of the District of Columbia approved June 25th, 1873, and not at that time equivalent to cash; that in committing this agreement, date of September 13th, 1873, to writing the stipulation "that said bonds be at par or equivalent to cash, and if not they would pay in cash the difference between the actual value and their face value," was by mistake omitted, and that the agreement as written is therefore silent in regard to kind of bonds, and that they were to be made equivalent to cash, and if not defendant would pay in cash the difference between their actual value and their face value, though it was intended by your petitioner and also by the Board of Public Works that that should be the agreement. A copy of the agreement as written is marked Exhibit "E."

Eighth. That between the 26th day of September, 1873, and the 2d day of October, 1873, your petitioner surrendered to the Board of Public Works the sum of $128,950 of certificates, as aforesaid; that after the sum of $15,000 was deducted there was delivered to your petitioner in bonds, on the express agreement that the bonds
16 were to be equivalent to cash, and if not the difference would be paid in cash, —, the face value of which represented $113,950, but their actual value in cash in the lawful money of the United States at that time was only about $62,672.50, making the difference between their face value and their actual value $51,277.50.

Ninth. That said Board of Public Works, not regarding the said contracts and agreements made with your petitioner prior and on September 26th and October 2nd, 1873, but contriving and intending to wrongfully withhold the sums due your petitioner under said agreements as actually entered into, has always hitherto delayed and refused to perform their agreements to pay in lawful money of the United States, or pay the difference in cash, according to the stipulations entered into with your petitioner, but the one of September 13th, 1873, omitted by mistake in committing the same to writing, and the said defendant, among other things, pretends that as the stipulations of September 13, 1873, made between your petitioner and the Board of Public Works, that the said bonds to be delivered should be equivalent to cash, is not contained in the written agreement, that they were not bound by the actual stipulation. But your petitioner is advised that this honorable court has the power to reform and rectify said written agreement, so defective by omission and mistake, so as to make it conform to the true agreement entered into by your petitioner and the Board of Public Works, by inserting in the clause alleged as aforesaid to have been omitted by mistake, and that when the said agreement is so reformed and rectified this honorable court has the power of enforcing a specific performance of the contract so reformed and rectified, by compelling the said District of

Columbia to pay the difference between the bonds so given at that time and cash or its equivalent, in accordance with the rectified agreement in writing and the true agreement entered into by the petitioner and the defendant.

Tenth. That by the terms of said contracts the Board of Public Works, on behalf of the District of Columbia, expressly stipu-
17 lated and agreed to pay, in the lawful money of the United States, to your petitioner, the contract price for all work done under said contracts.

That the said Board of Public Works, on behalf of the District of Columbia, did fail and refuse to pay your petitioner in the lawful money of the United States, as they had expressly agreed to do, and have failed and refused to make equivalent to cash said bonds received by your petitioner under protest, but compelled your petitioner to receive bonds of indebtedness of the District of Columbia of the value in the lawful money of the United States of 40 to 65 cents on the dollar.

That by the failure of the said Board of Public works to comply with their part of the contracts, in regard to paying your petitioner in the lawful money of the United States, and to make said bonds equivalent to cash, and compelling petitioner to receive bonds of the District of Columbia of the actual value of about one-half of the value of lawful money of the United States, petitioner did have to sell said bonds, received as aforesaid, and he sold them and realized the highest market value; that by the failure of the Board of Public Works to comply with their part of the contracts petitioner was damaged to the amount of sixty-eight thousand dollars ($68,000), in lawful money of the United States.

Your petitioner alleges that he received the said bonds under protest, and also protested against the deduction of the said $15,000 *dollars* from the amount that was due him, but in order to get the settlement aforesaid, he allowed it to be deducted, if they would then and there pay him cash; that defendant has received lawful money of the United States, as also from the taxpayers of the District of Columbia, that should have been applied to the payment of the plaintiff's claim, as they were paid and collected for the identical work done by your petitioner under his said contracts, and were moneys had and received by the defendant for the use of plaintiff.

18 Petitioner alleges that he fully complied with the terms of said contracts.

Eleventh. That after the various deductions aforesaid, and computing the value of the bonds at 55 cents on the dollar in lawful money of the United States, would leave due your petitioner the sum of $51,277.50, and also the sum of $15,000, with interest at 6 per cent. from October 2nd, 1873, until paid.

Twelfth. Your petitioner therefore prays that the said agreement of September 13th, 1873, as committed to writing, may be reformed and rectified so as to give effect to the true intention of the parties; and that said District of Columbia may be adjudged and decreed to pay in cash, or its equivalent, to your petitioner, in accordance with

said rectified instrument and the original contract in writing, and that your petitioner have such other and further relief as his case may require; wherefore he demands judgment against the District of Columbia in the sum $68,000, with interest.

Your petitioner further represents that no assignment or transfer of said claim, or any part thereof or interest therein, has been made, and that he believes he is justly entitled to the amount claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true, and that he has at all times borne true allegiance to the Government of the United States; that he has not in any way voluntarily aided or abetted or given encouragement to the rebellion against the said Government.

PATRICK CULLINANE.

V. B. EDWARDS, *Attorney.*
M. BLAIR, *Of Counsel,*
P. O. Address, 611 *F Street, N. W.*

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Patrick Cullinane personally appeared before me and made oath according to law that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made by your petitioner, and that he believes he is justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

PATRICK CULLINANE.

Subscribed and sworn to before me, this 22nd day of June, A. D. 1881.

[SEAL.] L. C. YOUNG,
Notary Public.

19 EXHIBIT "A." Contract No. 20.

This contract, made and concluded this eighteenth day of September, in the year one thousand eight hundred and seventy-one, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and Patrick Cullinane, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense, all the necessary materials and labor, and in a good, firm, and substantial manner, to lay and put down a brick foot
20 pavement along Four-and-a-half street west, from Maine avenue to the Arsenal, in the city of Washington, D. C., and to

set the curb-stones along said Four-and-a-half street west and between said points, this said paving to be executed in all respects in conformity with the specifications following, to wit:

* * * * * * *

(Specifications for—
" " setting curb.
" " brick foot pavements, left out.)

Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper to inspect the material to be furnished, and the work to be done under this contract, and that such person or persons shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced on or before the twenty-third day of September, one thousand eight hundred and seventy-one.

21 Fourth. It is further agreed that the said party of the first part may on notice to the party of the second part suspend work under this contract, but if not suspended it shall be completed within ninety days from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part.

Fifth. It is further agreed that if at any time the party of the first part shall be of the opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all of the work may be discontinued under this contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable by contract or otherwise to work at and complete the work herein described, or any part thereof, and

22 to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the party of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be then due, or may at any time thereafter grow due, to the said party of the second part, under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the party of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum, the amount of such excess shall be paid to the party of the first part by the party of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered

23 in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or

otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract, in cash current, and not in what is denominated store pay or orders; and that he will from time to time and as often as may be required by said party of the first part furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required; and if such evidence is not furnished such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of
24 the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit with said certificate his estimate of the amount due the party of the second part, then within thirty (30) days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agree- that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with and the
25 engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract: Provided, That payments on account may be made by direction of the board, otherwise than upon the estimates of the engineer as provided above, if in their opinion the prompt execution of this work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of one year from the completion of the work to be done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the
26 first part, and in case of failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the party of the first part at the cost and expense of the party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading footway, per cubic yard, twenty cents.

Paving with new brick, per square yard, eighty cents.

Relaying old brick pavement, per square yard, twenty-five cents.

Setting new curb-stones (6″), per lineal foot, thirty cents.

Resetting old curb-stones (4″), per lineal foot, fifteen cents:

Provided, That bricks shall be furnished by the board at a
27 price not exceeding eleven dollars and fifty cents per thousand, curb-stones to be delivered on the line of work by the board free of cost to the contractor, which said sums or prices the said party of the first part shall pay to the said party of the second part as herein provided.

Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants.

Twelfth. And the said party, constituting and composing the Board of Public Works in and for the District of Columbia aforesaid, agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay, or cause to be paid, to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due him according to the contract.

Thirteenth. It is further agreed that this contract shall be
28 subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
S. P. BROWN, [L. S.]
A. B. MULLETT, [L. S.]

Board of Public Works of the District of Columbia.

PATRICK CULLINANE,
Contractor.

Signed and sealed in presence of—
W. E. NOTT.
LEWIS H. HALL.

Bond in the sum of $2,706, dated September 18th, 1871.

29 Exhibit B, C, and D are each of the same form as Exhibit A, except the number, date, kind of work, and place to be done and price for the same.

Extension of Contract No. 20.

It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the grading and macadamizing at the board rates of Four-and-a-half street west from Missouri ave. to Arsenal gate, in the city of Washington, D. C., said work to be executed in every respect in conformity with the accompanying specifications.

Witness our hands and seals the first day of July, A. D. 1872.

H. D. COOKE, [SEAL.]
ALEX. R. SHEPHERD, [SEAL.]
JAMES A. MAGRUDER, [SEAL.]
[SEAL.]
[SEAL.]

Board of Public Works of the District of Columbia.

PATRICK CULLINANE,
Contractor.

Signed and sealed in presence of—
WM. E. NOTT.
JOHN A. HURLEY.

30 *Specifications for Constructing Roadway of McAdam Metal.*

Board of Public Works, District of Columbia.

(1) The road will be dressed to the proper grade and cross-section to (12) twelve inches below the surface of the street when finished.

(2) The surface will be well compacted by rolling and ramming. Any mud or soft or compressible material in the road-bed will be removed and the space filled with clean earth or gravel.

(3) On this bed the metal will be spread in a uniform layer of (8) eight inches. The whole will then be compacted by rolling and ramming in such places as the roller cannot reach.

(4) This base course of metal will be of broken stone, of any hard and firm stone which may be approved by the engineer. This stone will be broken to pass through a ring (3) three inches in diameter by its longest dimensions, and screened from all dirt and particles less than one-quarter of an inch wide.

(5) On this base course will be spread the top course of metal (4) four inches thick, made from hard and compact stone. Gran-
31 ite, trap, or equally hard stone will be required for this top course. No sandstone, mica, slate, or any stone which contains mica will be used.

(6) The stone for this course will be screened and entirely freed from dust and the finer particles of stone. This top course will be well compacted by rolling. On this course will be spread the top dressing obtained from the screening of the top course in sufficient quantity to be half (½) an inch thick after filling the surface void spaces of the top course.

(7. Draining pipe-drains will be laid wherever required and connected with the manholes of the sewers. They will be paid for by the lineal foot, at a price to be determined by the board.

Bond in the sum of $20,000, with Thomas Kirby, Morris Murphy, and Geo. W. Goodall, sureties, dated July 1, 1872.

EXHIBIT "E."

SEPTEMBER 13TH, 1873.

It is hereby agreed that in virtue of a settlement this day made between Patrick Cullinane and the Board of Public Works of the District of Columbia the board agrees to deliver to Patrick
32 Cullinane during the coming week bonds of the District of Columbia in such amounts as the auditor of said board may find due said Cullinane.

JAS. A. MAGRUDER,
Treas. Board of Public Works.
H. A. WILLARD, *B. P. W.*

VII.—*Findings of Fact and Conclusion of Law. Filed May* 14, 1883.

This case having been heard before the Court of Claims, the Court upon the evidence, finds the facts to be as follows:

I.

On the 18th of September, 1871, the following contract was entered into between the claimant and the Board of Public Works of the District of Columbia:

This contract, made and concluded this eighteenth day of September, in the year one thousand eight hundred and seventy-one, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and Patrick Cullinane, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to lay and put down a brick foot-pavement along Four-and-a-half street west, from Maine avenue to the Arsenal, in the city of Washington, D. C., and set the curbstones along said Four-and-a-half street west, and between said points, the said paving to be executed in all respects in conformity with the specifications following, to wit:

* * * * * *

(Specifications for setting curbstones and brick foot-pavements left out.)

Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person

or persons shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced on or before the twenty-third day of September, one thousand eight hundred and seventy-one.

Fourth. It is further agreed that the said party of the first part may, on notice to the party of the second part, suspend work under this contract; but if not suspended, it shall be completed within ninety days from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part.

Fifth. It is further agreed that if, at any time, the party of the first part shall be of the opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all the work may be discontinued under this contract, or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the party of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be then due, or may at any time thereafter grow due, to the said party of the second part under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the party of the second part shall be entitled to receive the difference; and in case such expense shall exceed the last said sum, the amount of such excess shall be paid to the party of the first part by the party of the second part.

33

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract in cash current, and not in what is denominated store pay or orders; and that he will from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished, such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify in writing that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then within thirty (30) days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificte of said engineer, as hereinbefore provided; and the said party of the second part further agree that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract: Provided, That payments on account may be made by direction of the board otherwise than upon the estimates of the engineer as provided above, if in their opinion the prompt execution of this work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of one year from the completion of the work to be done under this contract any part or parts thereof shall become defective, from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the first part; and in case of failure or neglect of the said parties of the second part so to do, the same shall be done under the directions and orders of the party of the first part at the cost and expense of the party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading footway, per cubic yard, twenty cents.

Paving with new brick, per square yard, eighty cents.

Relaying old brick pavement, per square yard, twenty-five cents.

Setting new curb-stones (6″), per lineal foot, thirty cents.

Resetting old curb-stones (4″), per lineal foot, fifteen cents.

Provided that bricks shall be furnished by the board at a price not exceeding eleven dollars and fifty cents per thousand, curb-stones to be delivered on the line of work by the board free of cost to the

contractor, which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants.

Twelfth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due him according to the contract.

Thirteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to pro-
34 vide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
S. P. BROWN, [L. S.]
A. B. MULLETT, [L. S.]

Board of Public Works of the District of Columbia.

PATRICK CULLINANE, *Contractor.*

Signed and sealed in presence of—
W. E. NOTT.
LEWIS H. HALL.

II.

On the 1st of July, 1872, an extension of the said contract was agreed upon and reduced to writing by the claimant and said board in the terms and form following:

Extension of Contract.

It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the grading and macadamizing, at the board rates, of Four-and-a-half street west, from Missouri ave. to Arsenal gate, in the city of Washington, D. C., said work to be

executed in every respect in conformity with the accompanying specifications.

Witness our hand and seal the first day of July, A. D. 1872.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAS. A. MAGRUDER, [L. S.]
Board of Public Works of the District of Columbia.
PATRICK CULLINANE, *Contractor.*

Signed and sealed in presence of—
W. E. NOTT.
JOHN A. HURLEY.

Specifications for Constructing Roadway of McAdam Metal.

Board of Public Works, District of Columbia.

First. The road will be dressed to the proper grade and cross-section (12) twelve inches below the surface of the street when finished.

Second. The surface will be well compacted by rolling and ramming; any mud or soft or compressible material in the road-bed will be removed and the space filled with clean earth or gravel.

Third. On this bed the metal will be spread in a uniform layer of (8) eight inches. The whole will then be compacted by rolling and ramming in such places as the roller cannot reach.

Fourth. This base course of metal will be of broken stone of any hard and firm stone which may be approved by the engineer; this stone will be broken to pass through a ring (3) three inches in diameter by its longest dimensions, and screened from all dirt and particles less than one-quarter of an inch wide.

Fifth. On this base course will be spread the top course of metal (4) four inches thick, made from hard and compact stone; granite, trap, or equally hard stone will be required for this top course. No sandstone, mica, slate, or any stone which contains mica will be used.

Sixth. The stone for this course will be screened and entirely free from dust and the finer particles of stone; this top course will be well compacted by rolling; on this course will be spread the top dressing obtained from the screening of the top course in sufficient quantity to be ($\frac{1}{2}$) half an inch thick after filling the surface void spaces of the top course.

Seventh. Draining pipe drains will be laid wherever required, and connected with the man-holes of the sewers. They will be paid for by the lineal foot at a price to be determined by the board.

Bond in the sum of $20,000, with Thomas Kirby, Morris Murphy, and Geo. W. Gooddall, sureties, dated July 1, 1872.

III.

Between the 18th of September, 1871, and the 14th of July, 1872, three other written contracts were entered into between the claimant and said board for improvement of streets in Washington, which

contracts were drawn, except as to dates, description of work and prices, in the same form as that set forth in finding I.

IV.

For word done by the claimant under the contract set forth in finding I, and the extension thereof set forth in finding II, and the other three contracts mentioned in finding III, the defendant became indebted to claimant in the gross sum of $191,065.44, from which the defendant was entitled to deduct for material furnished him, and for certificates issued by it to material men, $24,002.62, leaving a gross balance of $167,062.82 due him. On account of this the defendant paid him $38,112.82 in money, after deducting which there was a balance due him of $128,950, for which he held divers and sundry certificates issued to him by the auditor of said board, commonly called auditor's certificates, given by authority of said board, as evidence of its indebtedness, in the form following:

No. —. OFFICE OF AUDITOR OF BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., ——, 18—.

I hereby certify that I have this day audited and allowed the account of —— —— for work on —— ——, amounting to $——.

—— ——, *Auditor.*

V.

The claimant held for some time the auditor's certificates, amounting to the said sum of $128.950, and finding that he could not raise any money on them he exchanged them April 8, 1873, for an equal amount of other certificates, known as improvement certificates, of which the following is a sample:

No. 2207. BOARD OF PUBLIC WORKS, $200.
WASHINGTON, D. C., *April* 8, 1873.

This is to certify that for work done under the direction of the Board of Public Works of the District of Columbia, agreeably to acts of the Congress of the United States and of the Legislative Assembly of said District, there is due P. Cullinane the sum of two hundred dollars. This certificate will be received in payment of special assessments prior to issuing certificates of indebtedness against individual property, for improvements made in the District of Columbia, under contracts with the Board of Public Works, when the assessments are equal to, or exceed the, amount of the certificate.

By order of the Board of Public Works.

J. C. LAY, *Auditor.*
S. P. BROWN, *Secretary.*

JAMES A. MAGRUDER,
Treasurer Board of Public Works.

The said sum of $128,950 embraced the auditor's certificates which had been issued to the claimant for all the work done by him on 4½ street under the extension of contract set forth in finding II.

36 VI.

Under the said extension of contract the claimant proceeded to do the work on 4½ street called for in that extension, and received therefor auditor's certificates as aforesaid.

On the 26th of November, 1872, R. A. Bacon and others addressed to the Board of Public Works a complaint against the character and quality of that work, which complaint was referred by the board to R. C. Phillips, chief engineer, with directions to inspect and finally report upon the work, who, on the 6th of December following, made to the board the following report:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
OFFICE OF CHIEF ENGINEERS,
WASHINGTON, D. C., *Dec.* 6, 1872.

Board of P. Works.

GENTLEMEN: Referring to your endorsement on letter of R. A. Bacon, Esq., Nov. 26, 1872, compl'g of work on 4½ st. from 6th st. to Arsenal gate, I have the honor to report that having notified Dr. Wallace, both the special sup'rs, and Mr. Cullinane, contractor, that I should make a thorough examination of 4½ street from 6th to Arsenal gate yesterday, at 2 p. m., all the parties were present, except Dr. Wallace (the death of whose father prevented), I caused some twenty openings to be made in the macadamizing and the foot pavements at points selected by me. I found the macadam to be composed mainly of a rather hard quality of micaceous stone, not so hard as could be desired, and sand and gravel, a few small bowlders or cobble-stone occasionally occurring. Some of the top dressing contains too much loam, but generally it is good clean sand or gravel. The whole (except near the Arsenal gate, where the street has not yet been rolled) is firm and compact, and will be found a good road of its kind. The actual depth of the metal varied from 10 to 14 inches, the average being above a foot.

The footwalks are good brick, and pretty well laid. The sand and gravel beneath them is of good quality, and at the shallowest place found 4 inches in depth (this only in one case); generally the depth was about 8 inches. There are a few places where the pavement is not yet completed (foot-walks), and a few others where, from setting of trenches, &c., it is slightly out of order, but Mr. C. promised to repair the whole line in the spring.

There are two objections to the street as improved:

1st. It has too little crown, and

2d. It should have flagging gutters throughout its whole length. Neither of these objections are the fault of the contractor.

I respectfully recommend that flagging gutters be laid, and that as soon as the portion not yet fully completed be finished, and the repairs promised made, that the work be accepted.

Respectfully, &c., R. C. PHILLIPS,
Ch'f Eng'r.

December 9, 1872, this report was by the board "referred to the auditor, approved."

VII.

After said report was made and approved, and after the claimant's accounts for the work done on 4½ street were credited by the auditor of the board and the auditor's certificates therefor were delivered to the claimant, the roadway of said street was dug up 19 feet wide and 15 inches deep in the middle of the road by a street railroad company for the whole length of the work done by the claimant, before the examination of the street made by H. A. Willard, a member of the board, as shown in the next succeeding finding.

VIII.

On the 8th of July, 1873, the vice-president of the board requested H. A. Willard, a member of the board, to make a thorough
37 investigation of 4½ street, macadamized by the claimant, and said Willard made the investigation and reported the result, as follows:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *July* 15, 1873.

Hon. A. R. Shepherd, Vice President, &c.

SIR: In reply to your communication of the 8th inst., requesting me to make a thorough investigation of 4½ St. S. W., macadamized by Patrick Cullinane, and about which so much complaint has been made, I have the honor to report as follows:

I have very carefully and thoroughly examined this work by going over the entire street, by digging holes at various points, and by comparing it with other macadamized roads, viz: New York ave. and the Seventh-st. road. I have also called to my aid the experience of Col. T. B. Samo, the able ass't eng. in charge of the Washington aqueduct, whose report is herewith transmitted.

I find that the terms of the contract have not been carried out in the following respects:

First. The specifications call for twelve (12) inches of stone, broken so as to pass through a ring three inches in diameter by its longest dimensions. On digging eight holes in different parts of the street, I found many of the stones of large size, and extending only to a depth of from seven (7) to nine (9) inches. I also found that the stone was very generally mixed with gravel and earth, while the specifications expressly state that the stone shall be screened from all dirt and particles less than one-quarter of an inch wide. The top course is covered with loam and sand.

By reference to the report of Col. Samo it will be seen that he finds the following violations of the contract:

1st. The depth of stone averages from 7 to 10 inches instead of 12 inches.

2d. The stones are not broken sufficiently small.

3d. They have not, apparently, been screened.

4th. The top dressing is not composed of the material specified.

These violations are in complete accordance with my own views as expressed above.

From information derived from intelligent residents along the line of the street, and from other reliable sources, I find that the rolling was insufficiently done, and that the two courses of stone were very generally put down at the same time. This may account, in some degree, for the very uneven surface of the road. Some allowance should be made to the contractor on account of the digging up of the centre of the street for the purpose of laying the street railroad, which I find has been done since the work on the street was commenced, and consequently that portion is in a worse condition than the other part.

To put this street in such a condition as to conform to the terms of the contract, so far as it is possible to do in its present state, it would be necessary to remove all the earth, dirt, and loose stone by careful sweeping, and then to cover the street with fine broken stone two inches in depth, to be well rolled with a steam roller, then to cover this with good gravel, which must again be rolled.

I have obtained estimates from two parties for making the repairs above suggested, without, however, permitting the parties to be aware of the exact street for which they were estimating. The number of square yards upon the street covering Cullinane's contract is 46,933.

Wm. Holmead's estimate is 55 cents per sq. yd. (including graveling), which will amount to $25,813.15. J. T. Hall's estimate (including graveling), is 52½ cents per sq. yd., which will amount to $24,639.82, which is $1,173.32 less than the former bid. In answer to your interrogatory as to which is the most advantageous offer submitted for covering the street with two coats of asphaltum, warranting the same for three years, as in other cases where asphalt pavements have been laid by the board, I have to say that the following propositions have been received: L. S. Filbert, $2.30 pr. sq. yd., which will amount to $107,945.90; C. E. Evans, $2.18 pr. sq. yd., = $102,313.94; Geo. Follansbee, $2, = $93,866.

In view of the expense that will necessarily be incurred in putting down the asphalt pavement, and the present financial condition of the board, it will be for them to decide whether it would be advisable at this time to adopt this mode of repairing the street.

Since the above was written, the following propositions have been received from Mr. Wm. B. Parisen:

To remove the surface accumulation, turn up the stone and cement the same, put on 2 inches of wedging and 3 inches of asphalt mastic, at $2 pr. sq. yd., warrant it for 5 years, the work to be completed in 75 days.

If the board decide to use the asphalt pavement, this is by far the most advantageous bid.

Very respectfully,

H. A. WILLARD.

38 IX.

On the minutes of the board of July 23, 1873, appears the following entry:

P. Cullinane was furnished with a copy of report in case of 4½ street, by which it appears that to complete his contract in accord-

ance with its specifications it will cost $24,639.82; that he will be required to put this street in full accordance with specifications within 10 days, or it will be done at his expense under directions of the board. No payments will be made on his certificates or of any amount which may be retained by the board until this is done; that his bondsmen, Morris Murphy, Thomas Kirby, and George W. Goodall, have been furnished with copy of this letter and report, and were notified that they will be held responsible with him in the above amount. Auditor notified.

On the same date the following letter was addressed by the vice-president of the board to the claimant, accompanied with a copy of the aforesaid report of H. A. Willard:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *July* 23, 1873.

P. Cullinane, Esq.:

SIR: I enclose a copy of the report made in the case of your contract for the improvement of Four-and-a-half street, by which it appears that to complete your contract in accordance with its specifications it will cost $24,639.82.

You will be required to put the street in full accordance with the specifications within ten days or it will be done at your expense under the direction of the board. No payments will be made you on certificates, or of any amounts which may be retained by the board until this is done. Your bondsmen have had a copy of this report and letter served upon them, and have been notified that they will be held responsible with you in the above amount.

Very respectfully,

A. R. SHEPHERD,
Vice-President.

To this letter the claimant sent the following answer:

WASHINGTON, D. C., *July* 24, 1873.

Hon. A. R. Shepherd, vice-president of the Board of Public Works:

DEAR SIR: I have the honor respectfully to acknowledge the receipt of your communication of the 23d inst., transmitting the report of Hon. H. A. Willard to you of his inspection of my work in macadamizing 4½ street.

Notwithstanding I am surprised at the conclusion reached by Mr. Willard, yet I do not desire and cannot afford to be placed in a position of apparent antagonism to the District government, or to the rest, under the imputation of having imperfectly executed my work.

I feel certain of having substantially complied with the terms of my contract for macadamizing 4½ street.

The board had two inspectors constantly supervising the manner of executing my work, and I am quite sure they made regular reports to you as the work progressed. In addition to their vigilant watchfulness, I beg to call your attention to the report of your then chief engineer, R. C. Phillips, of date Dec. 6th, 1872, to your board. In reference to the macadamizing, he says the whole (except near

the Arsenal gate, where the street has not been rolled) is firm and compact, and will be found a good road of the kind. The actual depth of the metal varied from 10 to 14 inches, the average being above a foot. Mr. Phillips further says in his report that the objections he finds to the work are not the fault of the contractor.

Since I completed my work, the Met. R. R. Co. have torn up the center of the street, and made it look ragged and incomplete. You will not, I am quite sure, require me to incur the expense of repairing their work.

The District government are now indebted to me over one hundred and thirty thousand dollars for work done. I am largely indebted, and you will readily perceive that it is impossible for me to engage in a work of any considerable magnitude so long as the present order continues against me. You certainly do not intend to require me to do a work Mr. Willard estimates to cost nearly twenty-five thousand dollars, and at the same time render it impossible for me to do anything by withholding over one hundred thousand dollars that should have been paid me some months ago. I am perfectly willing to do everything I ought to do, and you know
39 I have heretofore willing- complied with every order of the board. You will not fail, I am certain, to take my case under careful consideration, and not charge upon me what the R. R. Co. are manifestly responsible for. At any rate you will not continue me in my present unpleasant and undeserved position.

Very respectfully, your ob't ser't,

PATRICK CULLINANE.

X.

After the foregoing correspondence took place the claimant, through his attorney, made efforts to obtain a settlement of matters with the board, and, after an interview with said Willard, he addressed to him the following letter.

WASHINGTON, D. C., *Aug.* 11*th*, 1873.

Hon. H. A. Willard, B'd Pub. Works.

SIR: In considering my proposition of last night, to compromise my claim with the board, I beg to state that $110,696 in certificates I hold were dated last Feb'y, and balance last April.

The interest, you will observe, if I go to court and succeed, will amount to about	$4,000 00
Add discount on D. C. bonds:	
Say 10% off	12,000 00
Add 7,000, as proposed yesterday	7,000 00
Total	23,000 00

So that my proposal is virtually discounting the amount allowed me at least $23,000.

Respectfully,

PATRICK CULLINANE,
By L. G. HINE, *His Att'y.*

XI.

September 9, 1873, the claimant sent the following letter:

Hon. A. R. Shepherd, V.-Pres't B'd Public Works.

SIR: There is due me for work done the board, besides macadamizing the carriage-way on 4½ street, sixty thousand seven hundred and six dollars and sixty cents ($60,706.60.) Please submit to the board this fact with a view to ordering its payment. The fault found with my work seems to be confined to the carriage-way on 4½ St., and I am quite sure the board will not withhold my entire pay. The total amount allowed me, besides payments received, is $131,914.52. There is also $1,175.00 due me for delivering 1,175 loads of dirt at the canal, which has not been audited.

Washington, D. C., Sept. 10th, 1876.

Respectfully, PATRICK CULLINANE.

In reference to this letter the following appears on the minutes of the board, September 10, 1873:

Patrick Cullinane was notified in reply to his proposition of 9th instant that the board declined to acceed to it; that they will pay in bonds the amount of his certificates, less $24,639.83, the amount required to put the work in good order.

This action of the board was communicated to the claimant in the following letter:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *Sept. 10th*, 1873.

Patrick Cullinane, Esq.

SIR: In answer to your proposition of the 9th inst., addressed to the vice-president of this board, I am instructed to say that the board decline acceeding to it.

I am also instructed to state that they will pay in bonds the amount of your certificates, less $24,639.83, the amount required to put your work in order in accordance with the specifications.

Very respectfully, CHAS. S. JOHNSON,
Ass't Sec'y.

40 September 10, the following letter was sent by the claiment to said H. A. Willard:

WASHINGTON, *Sept. 10th*, 1873.

Hon. H. A. Willard.

SIR: For the purpose of settling all matters of dispute between the B'd of Public Works and Patrick Cullinane, he proposes as follow:

1st. To take D. C. bonds to the amount of the estimate (or approved bills) made for him, less seven thousand dollars; or,

2d. To take in money the amount of his work approved by the board, excepting the macadamizing of carriage-ways on 4½ St., and leave that work to be referred to arbitrators in the usual way, and amount found by them to be paid in cash.

This proposition made only for the purpose of obtaining an early settlement.

PATRICK CULLINANE,
By L. G. HINE, *His Att'y.*

XII.

After the correspondence hereinbefore set forth, there were verbal negotiations between the claimant and his attorney and individual members of the board, resulting finally in the signing and sealing by the claimant and the board of the following paper:

Whereas differences have existed between the Board of Public Works of the District of Columbia and Patrick Cullinane in reference to the contract of said Cullinane for improving Four-and-a half street, in the city of Washington, it is agreed to adjust the same by deducting from the total amount due said Cullinane the sum of fifteen thousand dollars, in consequence of the character of the work, in the judgment of the board, and the amount equitably chargeable against the Metropolitan Railroad Company, which said amount is to be hereafter fixed between said board and said company; bonds to be issued to said Cullinane for the balance due him.

Witness our hands and seals this thirteenth day of September, A. D. eighteen hundred and seventy-three.

PATRICK CULLINANE.	[SEAL.]
H. D. COOKE.	[SEAL.]
ALEX. R. SHEPHERD.	[SEAL.]
JAMES A. MAGRUDER.	[SEAL.]
ADOLF CLUSS.	[SEAL.]
H. A. WILLARD.	[SEAL.]

It does not appear that there was, before or at the time of the signing of this paper any other agreement than this between the claimant and the board as to the settlement of the matters of difference between them; nor does it appear that there was any stipulation connected with said settlement, which, after having been agreed upon between the parties, was omitted, by mistake or otherwise, from said paper.

XIII.

In pursuance of the agreement set forth in the next preceding finding the treasurer of the board issued and delivered to the claimant bonds of the District of Columbia, of the description known as "permanent improvement bonds," to the amount, on their face, of $113,950, for that amount found to be due him for the work done by him under the contracts referred to in the first three of the foregoing findings, after deducting $15,000 for defective work; of which bonds the following is a sample:

Permanent Improvement Bonds.

UNITED STATES OF AMERICA, *District of Columbia:*

100 C.] Number 5212. [C 100.

This certifies that the District of Columbia, the capital of the Uni-

ted States, is indebted unto J. & W. Siligman & Co., or bearer,
41 in the sum of one hundred dollars, payable on the first day of July, A. D. eighteen hundred and ninety-one, with seven per cent. interest payable semi-annually on the first days of January and July in each year, at the First National Bank, in the city of New York, on the presentation of the proper coupon hereunto annexed. This bond is issued in pursuance of the act of Congress of the United States entitled "An act to provide a government for the District of Columbia," approved twenty-first of February, 1871, and of an act of the Legislative Assembly of the District of Columbia, entitled "An act making appropriation for reimbursing the Board of Public Works of the District of Columbia for the money expended by them for the erection and repair of pumps, cleaning and repair of streets, and raising and underpinning of houses and market-houses," approved June 25th, 1873.

In testimony whereof the Governor of said District has executed these presents duly attested by the seal of the District and countersigned by the secretary and comptroller.

Dated at the city of Washington, in the District of Columbia, this first day of July, A. D. eighteen hundred and seventy-three.

[Seal District of Columbia.]

H. D. COOKE, *Governor.*

Attest:

EDWARD L. STANTON, *Secretary.*
GEO. E. BAKER, *Comptroller.*

XIV.

At the time of the delivery of said bonds to the claimant they were, in the money market, below par, and he knew that fact.

XV.

After receiving said bonds the claimant hypothecated $45,000 of them with one Blumenburg, as security for money borrowed of him. The remainder of them he sold, but when, or for what prices, does not satisfactorily appear.

Upon the foregoing facts the conclusion of law is that the claimant's petition should be dismissed, on the ground stated in the following opinion:

VIII.—*Opinion of the Court.*

DRAKE, CH. J., delivered the opinion of the Court:

The claimant had four contracts with the Board of Public Works of the District of Columbia for the improvement of streets, under which he did a large amount of work. In regard to one piece of that work, the macadamizing of 4½ street S. W., a controversy arose between him and the Board, which delayed the settlement between them of a final balance due him on account of all the work done under the four contracts: After considerable negotiation the following agreement was arrived at, and signed and sealed by the claimant and all the members of the Board:

Whereas differences have existed between the Board of Public Works, of the District of Columbia, and Patrick Cullinane in reference to the contract of said Cullinane for improving Four-and-a-half street, in the city of Washington, it is agreed to adjust the same by deducting from the total amount due said Cullinane the sum of fifteen thousand dollars in consequence of the character of the work, in the judgment of the board, and the amount equitably chargeable againt the Metropolitan Railroad Company, which said amounts is to be hereafter fixed between said board and said company; bonds to be issued to said Cullinane for the balance due him.

Witness our hands and seals this thirteenth day of September, A. D. eighteen hundred and seventy-three.

PATRICK CULLINANE. [SEAL.]
H. D. COOKE. [SEAL.]
ALEX. R. SHEPHERD. [SEAL.]
JAMES A. MAGRUDER. [SEAL.]
ADOLPH CLUSS. [SEAL.]
H. A. WILLARD. [SEAL.]

42 In pursuance of this agreement bonds of the District of Columbia to the amount of $113,950 were delivered to and accepted by the claimant, which he hypothecated in part, and sold in part, at much below their par value.

He now sues to recover $68,000, which he alleges he lost by the depreciation of the bonds; and in order to lay a foundation for a recovery, he avers that the above writing did not fully express the actual agreement arrived at between him and the board; and he invokes the equitable jurisdiction vested in this court in cases against the District, to reform that writing, so as to make it express that actual agreement. His averment is, that there was omitted, by mistake, therefrom a stipulation which was agreed upon, that the bonds given to him in pursuance of that agreement "should be at par, or equivalent to cash, and if not, they (the Board of Public Works) would pay in cash the difference between the actual value and their face value."

If the agreement be not reformed by the addition thereto of this stipulation, the claimant has no case; for it is found as a fact that when he received the bonds he knew that their actual value was below par, and knowing this, he received them at their face value in settlement of his entire claim.

It is a well-settled rule of equity jurisprudence that if, in such a case, the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties.

It is an equally well-settled rule that if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief: upon the ground that the written paper ought to be treated as a full and correct expression of the intent until the contrary is established beyond reasonable controversy.

After careful consideration of the evidence in this case, we have felt constrained to find that it does not appear that there was, before or at the time of the signing of the agreement in question, any other agreement than that between the claimant and the Board of Public Works as to the settlement of the matters of difference between them; nor was there any stipulation connected with the settlement, which, after having been agreed upon between the parties, was omitted, by mistake or otherwise, from said agreement.

This finding, of course, leaves no ground whatever for equitable interposition to reform the agreement, which, therefore, must stand in its precise terms as the expression of the minds of the parties. The settlement having been carried out on both sides in accordance with those terms, the matter is finally closed. The claimant has no cause of action, and his petition must be dismissed.

43 XI.—*Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 14th day of May, A. D. 1883, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Patrick Cullinane, be dismissed.

44 X.—*Application of Claimant for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 14th day of May, A. D. 1883, in favor of the defendant, the claimant, by his attorney, on the first day of June, 1883, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Filed June 1, 1883.

VEDANTUS B. EDWARDS,
Attorney for Claimant.

And now, to wit, June 4, 1883, it is ordered that the application for an appeal in this case, filed June 1, 1883, be allowed as prayed for.

45 In the Court of Claims.

PATRICK CULLINANE
vs.
THE DISTRICT OF COLUMBIA. } No. 12.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the opinion of the Court, of the final judgment of the Court, of the application for allowance of ap-

peal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 23 day of June, A. D. 1883.

[Seal Court of Claims. Reipublicæ Civibusque.]

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 299. Patrick Cullinane, appellant, *vs.* The District of Columbia. Filed 25th September, 1883.

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CLERK

119-339

Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN F. CULLINNANE
AND
EDWARD D. DONNELLY,
Executors of the estate of Patrick Cullinnane, deceased.
vs.
THE DISTRICT OF COLUMBIA.

No. 57.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

The appellant, Cullinnane, brought suit in the Court of Claims, to recover from the District of Columbia the difference between the market value and the face value of certain certificates of indebtedness which appellant was compelled to accept. And also to recover the sum of $15,000 which, after the District had accepted the work and admitted the amount, refused to allow the same to be paid or converted into bonds unless this sum was deducted from the total amount found by the District to be due. And also to recover the damages for the detention of the money found due, from the time it was due and payable under the contract, till it was paid.

The petition of appellant was by the Court of Claims dismissed.

Assignment of Errors.

It is contended that the Court of Claims erred:

First. In holding that the appellant was not entitled to recover the difference between the market value and the face value of the certificates of indebtedness delivered to him.

Second. In holding that the appellant could not recover the sum of $15,000 deducted from his account, after the work had been accepted, and the amount admitted to be due him.

Third. In not rendering judgment for the sum of $4,835.62, the legal interest due on the sum admitted to be due from date, due till paid.

Points and Authorities.

The Court of Claims has found as facts substantially that the appellant had a valid *written* contract with the District of Columbia, (pages 16, 17, 18, 19;) that for all work done he was to be paid in cash the prices named in said contract, (p. 19,) and to be paid within 30 days from the date of the estimate of the Engineer of the Board of Public Works, (p. 18;) that the engineer aforesaid, measured the work, and it was approved by the defendants, (p. 22;) that after the contract was fully completed, the work done and accepted by the defendants, a street railroad company dug the street up 19 feet wide, 15 inches deep in the middle, the whole length of said street, (p. 23;) that no payment would be made by defendant until 4½ street was completed, (p. 25;) that appellant contended that the Board of Public Works ought not to require him to incur that expense, (p. 26;) that the work done by appellant for the District, under the written contract, measured by the engineer, and accepted by the District, and the

amount admitted to be due was . .	$191,065.44
Deducting material and cash paid, . .	62,115.44
Left the balance due him, . . .	$128,950.00

p. 21.

ARGUMENTS.

As the contract provided for a specific mode of payment, it was the duty of the obligor to pay accordingly, and the payment by the District in an entirely different medium from that provided for in the contract, rendered it liable for the difference. 20 Wallace, 289.

In the case of Loony *vs.* The District of Columbia 113, U. S., 258, this court decided different, but it is submitted that this is a different case to that; here the appellant was compelled to take the certificates, and he was compelled to surrender them, and take what he could get.

The amount of work done by appellant was certified to by the District Engineer, as provided for by the contract, his accounts were audited, and approved by the District, and evidences of indebtedness given him for the full amount of his work, but after his contract had been fully completed, the work accepted, the account stated, the balance found and admitted to be due, the defendants insisted that $15,000.00 be deducted, they insisting he ought to put the street in complete order, and the appellant that he ought not. Now it is contended that the court ought to have rendered a judgment against the District of Columbia for this sum with interest from the date due till paid.

94 U. S., 66.
15 Ct. Claims, 297.
2 Ct. Claims, 508.

The certificates of the engineer approving the work was conclusive, and the District was bound by it.

94 U. S., 98.
97 U. S., 398.
106 Mass., 373.

The findings of the Court of Claims disclose the fact that the balance found due, $128,950, was not paid until many months after it was due and payable, and it is respectfully submitted that the law of damages is well settled that the measure of damages is, that when no interest is specified, *the debt and legal interest from the time the debt is due, till it is paid;* is the true measure of damages, and the Court of Claims ought to have rendered judgment accordingly.

Field on Damages, p. 190.
3 Parsons' Contracts, p. 155.
Sedgwick Damages, p. 232.
6 Howard, p. 146.
16 Wallace, p. 378.
104 U. S., p. 771.

It is submitted that the judgment of the Court of Claims should be reversed, and the cause remanded to said court with directions to render judgment in favor of the appellant.

V. B. EDWARDS,
For Appellant.

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V. B. EDWARDS,
For Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1886.

PATRICK CULLINANE, Appellant,
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APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1886.

PATRICK CULLINANE, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 57.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The case is one where an unliquidated account was reduced to certainty by agreement of appellant and appellee, and the negotiable bonds of the appellee were delivered to the appellant at their par value in satisfaction of the amount found to be due.

The appellant, who knew the bonds so received were at a discount when he received them (Finding XIV; p. 29), sues now to recover the difference between the par value of the bonds so received and what he realized on them by sale and hypothecation, with interest as damages for the detention thereof.

It is submitted that there was a valid accord and satisfaction, and that the case is within the principle of Looney *v.* The District of Columbia (113 U. S., 258), upon which and the opinion of the learned court below (pp 29–31) the case is submitted and an affirmance of the judgment respectfully requested.

WM. A. MAURY,
Assistant Attorney-General.